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March 25, 2009

Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2009-04

Dear Clerk:

I enclose seven copies of this letter for distribution to the justices in the above matter when the time comes for their decision on the above proposals.

The statements by the justices regarding proposals for disqualification of Supreme Court justices mention but give short shrift to *tradition* and *the Constitution.*

TRADITION

There is no "127-year tradition" of Supreme Court justices themselves deciding whether to disqualify themselves. In one of the few published decisions involving Supreme Court disqualification, the motion was presented to, and decided by, the whole court. *Boyer v Backus,* 282 Mich 701 (1937). Not until the current century was there any published Michigan decision in which a justice asserted the power to decide such a motion himself.

In lower courts, too, allowing the accused judge to decide the motion cannot be justified by tradition. As adopted in 1963, the General Court Rules called for such motions to be decided by a judge from an adjoining circuit. 1963 GCR 405.2. Not until 1978 did an amendment to GCR 912.3(a) permit a judge to decide a disqualification motion brought against himself.

While there is no tradition permitting a judge to decide matters involving himself, there is a long tradition against it. As early as the first century B.C, Publilius Syrus wrote that a judge should not decide his own cause. Maxim 545, John Bartlett, *Familiar Quotations* (10th ed. 1919).

This became a rule of English constitutional/ common law: "even an act of Parliament made against natural equity, as to make a man a judge of his own case, is void in itself." Lord Coke, quoted at p. 410 of T.M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power...* (Boston: Little, Brown, and Company, 1868; also Union, New Jersey: The Lawbook Exchange, Ltd. 1999). Accord, 1 W. Blackstone, *Commentaries* 91; *Peninsular R Co v Howard,* 20 Mich 18, 25-26 (1870) (discussing English cases applying the maxim to hold that a judge's interest voids the judgment, and may be first raised on appeal).

By adopting the English common law, America also adopted the maxim that"No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment." See Federalist #10 (by James Madison).

THE CONSTITUTION

The notion that no man can be a judge of his own case is more than a tradition or a common-law maxim. "Due process of law" as guaranteed by the Constitution includes "an impartial decisionmaker." *Crampton v Department of State,* 395 Mich 347, 351 (1975); *Ward v Monroeville,* 409 US 57, 61-62; 34 L Ed 2d 267; 93 S Ct 80 (1972) (under the due process clause of the 14th Amendment, "petitioner is entitled to a neutral and detached judge"). Since a judge interested in the outcome is not impartial, this due process guarantee is violated by

- judging one's own case. *Zimmer v Board of Supervisors,* 159 Mich 213, 219 (1909).
- judging a case in which one has an interest. *Glass v State Highway Comm'r,* 370 Mich 482, 487 (1963) (highway commissioner); *Aetna Life Ins Co v Lavoie,* 475 US 813, 822; 89 L Ed 2d 823; 106 S Ct 1580 (1986) (state supreme court justice).
- sitting in judgment of one's own acts. *People v Cottrell,* 201 Mich App 256, 258 (1993) (trial court should not decide whether appeal has merit); *In re Murchison,* 349 US 133, 136; 99 L Ed 942; 75 S Ct 623 (1955) (one-man grand jury may not act as judge as well).

Existence of any of these problems is grounds to disqualify a judge. *People ex rel Whipple v Saginaw Circuit Judge,* 26 Mich 342, 345 (1873).

Justice Cooley would go further, saying that, apart from any Bill of Rights, allowing judges to decide their own controversies is simply not one of the powers delegated to the government by the people:

> A legislative act which should undertake to make a judge the arbiter of his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible power, neither legislative, executive, nor judicial, and wholly unknown to constitutional government.

Cooley, *op cit.* p. 175.

It is apparent that a judge deciding whether to disqualify himself is acting as the judge of his own case. Any rule or procedure that permits same is therefore *ultra vires* and a violation of constitutional due process.

APPEAL

If MCR 2.003 is constitutional at all, it is because the manifestly interested decision by a judge on the motion to disqualify him is subject to appeal to the chief judge, or to the state court administrator. MCR 2.003(C)(3)(a), 2.003(C)(3)(b). It follows that any rule that allows a justice to decide whether to disqualify himself is void absent provision for an appeal.

TIMING

MCR 2.003(C)(1), and several of the proposals, require that a motion to disqualify be brought within 14 days after bias is discovered. At least as applied to the Supreme Court, such a deadline would unfairly, unnecessarily and hence unconstitutionally burden the right to an unbiased decisionmaker.

The burdens imposed by the rule are manifest:

1. Requiring a *job applicant* to challenge an employer for bias *before a hiring decision* has been

made will dispose the employer negatively toward the applicant, thus encouraging the very thing the applicant wants to avoid: a biased hiring decision. Similarly,[1] requiring a motion to disqualify a judge before the judge has ruled is going to offend the judge, making it more likely that he will ultimately rule against the movant on the merits.[2] Requiring that a motion to disqualify be made before the judge rules thus requires a litigant to endanger his right to an unbiased judge as a condition of exercising the right.

2. Even if biasing the judge were not a problem, requiring a motion to disqualify before a biased decision has occurred imposes unjustifiably onerous problems of proof:

a) Where biased action has not yet occurred, the movant must argue the mere possibility that, in the future, the judge will act on his bias. The speculative nature of such an argument

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[1] Requiring one to challenge a judge for bias before the judge has acted in a biased manner is not only like having to sue an employer for hiring bias before the hiring takes place. It is also like requiring one to sue for breach of contract before the contract has been breached, or requiring one to sue a motorist with a bad driving record before the motorist has collided with plaintiff.

[2] The contention that a judge faced with a disqualification motion brought against himself can remain unbiased has been rejected on numerous occasions. *Tumey v Ohio*, 273 US 510, 532; 71 L Ed 749; 47 S Ct 437 (1927); *Ward v Monroeville*, 409 US 57, 60; 34 L Ed 2d 267; 93 S Ct 80 (1972); *Cooke v United States*, 267 US 517, 539; 69 L Ed 767; 45 S Ct 390 (1925) (judge who took offense at motion to disqualify should have recused himself). As stated in the last case,

> The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor... could carry it in without danger of injustice. Every procedure which would offer a possible temptation to the average man as judge...or which might lead him not to hold the balance nice, clear and true...denies...due process of law.

Indeed, even milder challenges to a judge's ego have been held to create an unduly high risk of arousing judicial ire. *People v Mayrand*, 300 Mich 225, 229 (1942) (objecting to judge's request for an independent psychopathic examination is excused, since counsel so objecting runs "the risk of antagonizing" the judge); *People v Timmons*, 300 Mich 653, 661-662 (1942) (consent to court-ordered investigation of alibi witnesses not a waiver, since objecting could have antagonized judge); *People v Harvey*, 13 Mich App 211, 213 (1968) (not complying with judge's request to view documents outside record ran risk of antagonizing judge); *People v Eglar*, 19 Mich App 563, 565 (1969) (nonobjection to judge's view of scene justified to avoid "possibly incurring the judge's displeasure").

If the Constitution excuses filing a motion that would "possibly incur [a] judge's displeasure," perforce the Constitution excuses filing a motion to disqualify at a time when it carries the danger of biasing the judge against the movant (i.e., before the judge has ruled).

Note that this problem exists not only where the disqualification motion is decided by the challenged judge, but also where the motion is decided by a different judge, but the challenged judge is aware of the motion.

almost always dooms it to failure.

b) Since no harm has yet occurred, there is no justiciable controversy for constitutional purposes, thus making rejection of a claim that the judge is unconstitutionally biased a foregone conclusion. *Los Angeles v Lyons*, 461 US 95, 102; 75 L Ed 2d 675; 103 S Ct 1660 (1982) ("hypothetical" harm insufficient); *MacDonald, Sommer & Frates v Yolo County*, 477 US 340, 348; 91 L Ed 2d 285; 106 S Ct 2561 (1986); *Williamson County v Hamilton Bank*, 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108 (1985). Note that this is so *even where the judge's bias has been proved.*

c) Just as an employer's hiring decision may itself be crucial evidence of hiring bias, so also is a biased judge's decision a key piece of evidence:

- The opinion may contain statements from which discriminatory animus may be inferred.
- The opinion may contain implausible or unreasonable justifications for the decision, thus creating an inference that they are pretexts for an improper motive.
- Even if no reasoning at all is given, the *lack* of reasoning is some evidence of bias (since, if a decision is not a product of bias, a judge ought to be able to offer a nonbiased reason for it).

Indeed, lack of an allegedly biased decision leaves no context in which to evaluate bias, making the issue itself vague, undefined and hence difficult to evaluate. *Williamson County, supra* at 473 US 200 (held, one cannot evaluate whether an unconstitutional taking has occurred until the consequences of the municipality's land use regulations have played out).

In short, until a judge has ruled, there is no reliable basis to evaluate whether unconstitutional bias really exists, or is a problem.

3. Even if biasing the judge and evidentiary problems did not exist, an argument that a judge is biased is simply not going to be considered as carefully if made at a time when no consequences of bias have appeared and may never appear, making the controversy hypothetical and possibly moot. This has been recognized in another context,

> The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Breckon v Franklin Fuel Co, 383 Mich 251, 267 (1970) (explaining why dictum is not controlling authority).

In short, requiring a disqualification motion before a judge has ruled forces the movant to risk prejudicing the judge for an outcome rendered highly uncertain by the facts that a) the evidence necessary to sustain the motion often does not yet exist and b) the issue is not yet ripe for decision. What compelling state interest exists for thus burdening the fundamental, due-process right to an unbiased decisionmaker?

The only colorable justification is that getting biased judges off the case before decision avoids the necessity for a do-over, should the judge be disqualified. This may be a valid concern where, for instance, we are dealing with a judge-tried case, where tardy disqualification would require retrial. However, the calculus changes when we are talking about a seven-judge appellate court:

1. The cost of a do-over is minimal if an appellate judge is disqualified, since the

nondisqualified justices need merely to re-decide the case based on their previous review.

2. Moreover, allowing post-decision disqualification motions at the Supreme Court level will reduce the incidence (and hence cost) of the motions themselves:

a) If a disqualification motion can be made post-decision, litigants have nothing to lose by waiting until the decision has been made. If the vote of the allegedly biased judge turns out not to be a swing vote, any incentive for moving to disqualify would disappear. By contrast, if the motion must be made pre-decision or not at all, not knowing whether the allegedly biased justice will be a swing justice means that the motion will have to be made "just in case."

b) A judge who has survived a pre-decision disqualification motion (as most do, given the heavy burdens placed on the movant) will be free to act on his biases with impunity. By contrast, a judge knowing that his decision may be the subject of a disqualification motion will be more inclined to suppress his biases and reach a fair decision, thus obviating the need for any disqualification motion.

In short, the high cost of do-overs at the trial level may justify requiring early motions to disqualify at that level. But the minimal cost of do-overs at the appellate level, plus the reduced incidence (and hence cost) of disqualification motions if an early filing deadline is removed leave no state interest compelling enough to impose the heavy burdens on the right to an unbiased decisionmaker that early disqualification deadlines impose.

In conclusion, the Constitution does not require (or even permit) a motion to disqualify unless and until the allegedly biased judge has acted on his bias. To conform with the Constitution, the court rules should be amended to permit a motion to disqualify within a reasonable time after an allegedly biased judge has acted on his bias. *Cf Boyer v Backus, supra* (stating that, although the better practice is to make a disqualification motion at the outset, it would address such an argument raised for the first time in a motion for reconsideration); *Peninsular R Co v Howard,* supra at 20 Mich 25-26 (judge's interest may be raised for the first time on appeal).

CONCLUSION

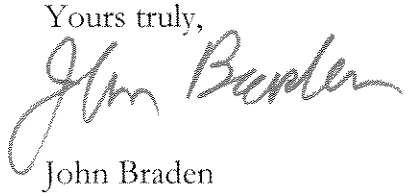
To bring Michigan disqualification procedures in line with the Constitution, the following changes are required at minimum:

1. The motion must be decided by an entity other than the challenged judge, either initially or at least on appeal.

2. The motion must be considered timely after the allegedly biased judge has ruled.

Adopting such a rule would be a signal that Michigan remains committed to civil liberties established by centuries of tradition and guaranteed by the Constitution.

Yours truly,



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